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In The

Supreme Court of the United States

October Term, 1961

No. 321

KALTRIEDER CONSTRUCTION, INC.,
Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI

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INDEX

	PAGE
Petition for a Writ of Certiorari	1
Appendix A—Opinion of District Court (Civil Action No. 6890)	5
Appendix B—Opinion of District Court (No. 13,827)	14

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vs.

United States of America,

Appellant

PETITION FOR A WRIT OF CERTIORARI

AND NOW comes the Kaltreider Construction, Inc. and files this its Petition for Writ of Certiorari:

1. The decision of the United States District Court for the Middle District of Pennsylvania is reported in 192 F. Supp. 229 (1961) and the same is appended hereto and marked as "Appendix A". The decision of the United States Court of Appeals for the Third Circuit is appended hereto and marked "Appendix B".

2. The grounds in which jurisdiction of this Court is invoked is titled 28 U.S.C.A., Section 1254(1). The judgment which is sought to be reviewed was entered on May 22, 1962.

3. The question presented for review is "Was the Taxpayer's claim for refund timely filed within Section 322(b)(1) of the Internal Revenue Code of 1939?"

4. Section 322 of the Internal Revenue Code of 1939 provides in part as follows:

"Internal Revenue Code of 1939:

Sec. 322. Refunds and Credits.

(b) Limitation on Allowance.

(1) Period of limitation.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(26 U.S.C. 1952 Ed., Sec. 322.)"

5. This action was instituted by the taxpayer for the recovery of income taxes and interest paid for the year 1952. The District Court denied the government's Motion for Summary Judgment holding that the taxpayer's claim for refund was timely filed. On March 16, 1953, taxpayer filed a federal income tax return for the calendar year 1952 and paid the taxes thereon shown to be due. On March 16, 1956, taxpayer filed an amended return of an additional income tax in the sum of $3,289.69. Interest there-

on in the amount of $592.67 which also was assessed was paid by the taxpayer on April 21, 1956. On May 29, 1958 taxpayer filed a claim for refund of the aforementioned tax. At the time when the above payment was made in 1956 there was pending before the Tax Court of the United States the case of *Walter H. Kaltreider and Irene C. Kaltreider, Petitioners vs. Commissioner of Internal Revenue* in which the Kaltreiders, husband and wife, contended that money sought to be recovered by the United States was not due and owing by them, but that part of such income tax was due and owing by Kaltreider Construction, Inc. and that for this reason the amended return was filed by Kaltreider Construction, Inc. in 1956. The Tax Court's decision was against the individual Kaltreiders, whereupon the Kaltreiders appealed to the United States Court of Appeals for the Third Circuit. On May 21, 1956, the Court of Appeals in *Kaltreider v. Commissioner of Internal Revenue*, 255 F. 2d 833, affirmed the decision of the Tax Court. Thus the corporation paid a tax which was a tax of the individuals and not of the corporation.

6. The basis of federal jurisdiction in the Court of the first instance is found in 28 U.S.C.A., Section 1646(a)(1).

7. The Writ of Certiorari should be allowed for the following reasons:

The taxpayer contends that its claim for refund was premature until the United States Circuit Court of Appeals for the Third Circuit had decided the question of the individual liability.

The taxpayer contends that its claim for refund was timely filed within both of the alternate limitation periods

described by Section 322(b)(1) of the Internal Revenue Code of 1939.

The government admits that it has received a tax from the taxpayer to which it is not entitled but has set up the defense of the statutes of limitations to avoid such payment.

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APPENDIX A

United States District Court
For the Middle District of Pennsylvania

Civil Action No. 6890

Kaltreider Construction, Inc.,
Plaintiff

vs.

United States of America,
Defendant

OPINION

This is an action for the recovery of income taxes and interest paid for the year 1952. The sole question involved is: "Was the claim for refund, upon which the taxpayer relies as a basis for this Court's jurisdiction in this action, timely filed?" The matter is presently before the Court on defendant's motion for summary judgment. The parties stipulated that the said motion should be determined without oral hearing upon briefs pursuant to Rule 78 of the Federal Rules of Civil Procedure and Rule 50 of the local rules of this Court. Affidavits and briefs were submitted by both parties.

The undisputed facts in the case are as follows: On March 16, 1953 plaintiff duly filed a Federal income tax

return for the calendar year 1952 and paid the taxes shown thereon to be due. On March 16, 1956 plaintiff filed an amended return showing additional income tax in the sum of $3,882.36, which it paid. On May 29, 1958, plaintiff filed a claim for refund of the afore-mentioned taxes. This claim for refund was rejected on the grounds that it was not timely filed. Plaintiff has admitted that none of the sums sought to be recovered in this action were paid subsequent to May 26, 1956.[1]

Plaintiff contends that on its amended return dated March 16, 1956 income tax in the sum of $3,882.36 was erroneously reported and paid by it; that at the time when the said amount was paid there was pending before the Tax Court of the United States the case of Walter H. Kaltreider and Irene C. Kaltreider, Petitioners vs. Commissioner of Internal Revenue, in which the Kaltreiders, husband and wife, contended that the money sought to be recovered by the United States was not due and owing by them but that part of said income tax was due and owing by Kaltreider Construction, Inc., plaintiff herein; that for that reason the amended return was filed by the plaintiff corporation.

Plaintiff further avers that the Tax Court's decision was against the individual Kaltreiders, whereupon the latter appealed to the Court of Appeals of the Third Circuit. On May 21, 1958, the Court of Appeals in Kaltreider v. Commissioner of Internal Revenue, 255 F. 2d 833, affirmed the decisions of the Tax Court.

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[1] According to claim for refund, the payments were actually made as follows: Check No. 18520, dated March 15, 1956 for $3,289.69 and Check No. 18768, dated April 21, 1956 for $592.67, making a total of $3,882.36.

The pertinent statutes here involved are as follows:

26 U.S.C. §322 (1952 Ed.):

"(b) Limitation on allowance—(1) Period of limitation.

"Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. * * *"

26 U.S.C. §7422 (1958 Ed.) Internal Revenue Code of 1954:

"§7422. Civil Actions for refund.

"(a) No suit prior to filing claim for refund.

"No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof."

Vol. 10, Mertens Law of Federal Income Taxation, Chap. 57, Page 31, §57.15, states as follows:

"Amended Returns. When the return required by law has been filed and thereafter an amended return is filed, the statute of limitations begins to run from the date the original return was filed, and the

filing of the amended return does not operate to extend the statute. The first return, however, must be complete and meet the statutory requirements; the statute of limitations will begin only upon the filing of a proper return. It is not always easy to determine whether the problem involved a 'tentative' 'defective,' 'amended' or 'original' return. Care must be exercised to prevent the facts from being confused by the terminology used."

It would seem to be clear that as to the content of the original return filed in this case on March 16, 1953 any claim for refund thereunder would have been barred March 16, 1956.

Plaintiff claims that on its amended return filed March 16, 1956 income was erroneously reported and additional tax in the amount of $3,882.36 was erroneously paid. The claim for refund of the tax paid on the amended return was filed May 29, 1958.

Counsel have not furnished me with a precedent directly in point and a careful research on my part has not disclosed any.

In Naggar Company v. Helvering, 308 U.S. 389, 394, the Court said:

> "All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose. * * *"

In that case an amended capital stock tax return filed within the extension period granted for filing its original re-

turn was held to be the taxpayer's first return within the meaning of Section 215(f) of the National Industrial Recovery Act (48 Stat. 195, 208). The Court further stated (page 395):

> "* * * A timely amended return is as much a 'first return' for the purpose of fixing the capital stock value in contradistinction to returns for subsequent years, as is a single return filed by the taxpayer for the first tax year. * * *"

Further (page 396):

> "* * * To construe 'first return' as meaning the first paper filed as a return, as distinguished from the paper containing a timely amendment, which, when filed is commonly known as the return for the year for which it is filed, is to defeat the purposes of the statute by dissociating the phrase from its context and from the legislative purpose in violation of the most elementary principles of statutory construction."

The amount involved in the present claim for refund has no reference to the return originally filed. The particular item was a matter of dispute in connection with the income tax return of Walter H. and Irene C. Kaltreider as individuals, as to which item their liability was established. See Kaltreider v. Commissioner of Internal Revenue, supra. Pending such determination, the corporation took the precautionary step of filing a supplemental corporate return, setting up this additional item and paying the tax thereon. It is this amount only for which a claim for refund was filed.

The Government's contention is that the three year statute of limitation began to run from the filing of what

it terms the "original" return. In support of its contention it cites Zellerbach Paper Co. v. Helvering, 293 U.S. 172. That case involved a deficiency assessment and dealt with an increase in tax liability under an intervening income tax act and the Court held that the period of limitation began to run against the making of a deficiency assessment against the taxpayer, from the filing of the original return. Such holding, however, was based upon the fact that any increase of tax liability was ascertainable by simple computations from the original return and that the deficiency assessments in large amounts were based mainly on grounds unrelated to any changes in the law by reason of which the subsequent return was filed. It merely held that an amendment or supplement of a return already filed would not toll a limitation which had once begun to run.

Were we dealing here with matters disclosed by and moneys paid under the "original" return, this reasoning might well apply. However, the later Haggar case, quoted, supra, makes it evident that there was no intent to establish an inflexible rule that the period of limitation begins to run both as to assessments and claims for refund from the "original" returns. The Haggar case specifically points out that an "amended" return may be a "first" return. It should also be noted that the statute as to the three year limitation on claim for refund does not say "original" return but merely "the" return. Likewise, Mertens Law of Federal Income Taxation, supra, cautions that "It is not always easy to determine whether the problem involves a 'tentative,' 'defective,' 'amended' or 'original' return." Certainly it is difficult to justify a statement that the period of limitation must run from the "original" return as to a claim for refund of a sum which

has neither been paid pursuant to nor set forth or revealed in such return. This would appear to be one of the absurd results to which Haggar, supra, refers.

The Government has submitted nothing as to Congressional intent which would require the words "the return" in the statute to be interpreted as "the original return." The Government has received the tax both from the individuals and from the corporation. As far as the corporation is concerned, it is an overpayment. Even so, were it clear that the words of the statute were referable only to the original return in a situation such as now before us, of course, as the Court stated in Kavanagh v. Noble, 332 U.S. 535, 538,[2] "assuming that the *Jenney* decision makes clear that the taxpayer here made an overpayment, the loss which he now suffers from an application of §322 (b) (1) is a loss which is inherent in the application of any period of limitations. Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. * * * Remedies for resulting inequities are to be provided by Congress, not the courts." Nothing has been submitted which seems to justify such a result in the instant case.

In Rittenbaum v. United States, D.C.N.D.Ga., 109 F. Supp. 480, the Court said:

> "The opinion of Judge McCord in Allen v. South Atlantic S.S. Co. of Delaware, 5 Cir., 177 F. 2d 257, 259, that
>
> "'It is without dispute that this taxpayer overpaid its tax for the year 1940 in a substantial amount.

[2] See also, Jones v. Liberty Glass Co., 332 U.S. 524.

* * * and now the Government seeks to escape paying a just claim by pleading the statute of limitations. Under such circumstances, unless the mandate of the enactment inexorably requires such a construction, it would be manifestly unjust and inequitable to permit the Government to retain this tax. * * *', is applicable here."

Equally pertinent are the Court's remarks in Dubuque Packing Company v. United States, D.C.N.D. Io., 126 F. Supp. 796, 799:

"The purpose of a statute of limitations is to compel the exercise of rights within a reasonable time after they accrue. A limitation is regarded as unreasonable that does not afford full opportunity to sue before the bar takes effect. * * * This concept of fair opportunity to sue is incorporated into Section 322 (b) (1) through the medium of the tax return. A tax return which does not disclose the requisite information necessary for the taxing authorities to determine tax liability does not start the statute of limitation running because the taxing authorities have not had a fair opportunity to determine whether a claim against the taxpayer exists. * * * Likewise even in the face of a retroactive tax act requiring an additional return, the old return will commence the statute of limitations where it gave all the information necessary for the computation of the new tax. (Citing Zellerbach Paper Co. v. Helvering, supra.) * * *

* * * * * * * * *

" * * * As heretofore noted, a 'return' or 'payment' will start the statute running. To do so the return

must define the tax obligation or give sufficient information to define the tax obligation. * * * In the case of a proper tax return the return itself defines the tax obligation. * * * In that case, (Thomas v. Mercantile Nat. Bank, 5 Cir., 1953, 204 F. 2d 943) the Court said, 204 F. 2d at page 944:

> "'It would be illogical to hold * * * that the statute of limitation began to run against a claim for refund before the deficiency itself came into existence, and *before the fact that there was an overpayment, and it so the amount thereof, became ascertainable.*'"

The principle is applicable whether it be a deficiency as in Dubuque Packing Company, supra, or a claim for refund of an overpayment. Certainly the "return" which gave the information necessary for the computation of the tax here involved and gave sufficient information to define the tax obligation and furnish a basis of a tax refund claim was "the return" spoken of as the amended return of March 16, 1956, and started the three year period of the statute running. The claim for refund was therefore filed within time.

Let Order be submitted in accordance with this Opinion.

March , 1961

FREDERICK V. FOLLMER
United States District Judge

APPENDIX B

United States Court of Appeals
For the Third Circuit

No. 13,827

Kaltreider Construction, Inc.

v.

United States of America,

Appellant

Appeal from the United States District Court for the Middle District of Pennsylvania.

Argued April 3, 1962

Before Goodrich and Ganey, *Circuit Judges*, and Sheridan, *District Judge*.

OPINION OF THE COURT

(Filed May 22, 1962)

By Goodrich, *Circuit Judge*.

This is an appeal by the United States from a judgment in favor of a taxpayer who sued for refund in the District Court for the Middle District of Pennsylvania. 192 F. Supp. 229 (1961). The point is narrow and techni-

cal. We think the district court was in error in deciding in favor of the taxpayer.

The facts are undisputed and both the taxpayer and the Government agree that the statute applicable to the case is section 322 of the Internal Revenue Code of 1939. The application of the statute to the set of facts is what makes the litigation.

Kaltreider Construction, Inc. (the corporation), filed an income tax return for the year 1952 on March 16, 1953. On March 16, 1956, the corporation filed an amended return in which it showed an additional tax due for the year 1952 in the amount of $3,289.69. This amount was paid on the same date. The trouble comes in what happened next. On May 21, 1958, the Court of Appeals for the Third Circuit, 255 F. 2d 833 (1958), decided that the amount reported by the corporation in its 1956 amended return should in fact have been reported and paid by Walter H. Kaltreider and Irene C. Kaltreider, the owners of the corporation, as individuals. Thus, the corporation paid a tax which this Court said was the tax of the individuals and not of the corporation.

Shortly after the decision of this Court the corporation filed a claim for refund of the $3,289.69 which it paid in 1956. This was rejected by the Commissioner on the ground that the claim was not timely filed. Following the rejection of the claim this suit was filed on February 12, 1960.

Section 7422 of the Internal Revenue Code of 1954 provides that no suit for refund will lie until a claim has been filed. Section 322 of the 1939 Code is the provision which provides the period of limitation for the filing of the claim

for credit or refund. The claim must be made within three years after the return is filed by the taxpayer or within two years from the time the tax is paid. The provision is explicit that no credit or refund shall be allowed after the expiration of whichever of these periods expires the later.[1]

From an examination of the dates set out above it is apparent that the corporation's claim for refund was not filed within the time specified. The argument is, however, that the three-year period should begin to run from the time the amended return was filed on March 16, 1956. The taxpayer, as well as the Government, quotes from 10 **Mertens, Federal Income Taxation, §57.15, as follows:**

> "Amended Returns.—When the return required by law has been filed and thereafter an amended return is filed, the statute of limitations begins to run from the date the original return was filed, and the filing of the amended return does not operate to extend the statute. The first return, however, must be complete and meet the statutory requirements; the statute of limitations will begin only upon the filing of a proper return. It is not always easy to determine whether the problem involves a 'tentative,' 'defective,' 'amended' or 'original' return. Care must be exercised to prevent the facts from being confused by the terminology used."

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[1] Int. Rev. Code of 1939, §322(b)(1), provides in pertinent part, as follows:

> "(1) *Period of limitation.* Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. . . ."

There is nothing to indicate that there was anything tentative or defective in taxpayer's original return. We think that the case comes squarely within Mertens' language and that the date of the original return governs. The point is not dissimilar to that regarding the time of payment which this Court considered in Hill v. Commissioner, 263 F. 2d 885 (1959).

The taxpayer suggests that its claim for refund was premature until this Court had decided the question of the individual liability of the Kaltreiders. We do not see the force of this argument. The Court had before it the question not of the corporation's liability but rather that of the owners of the corporation.

The Government's brief emphasizes the undoubted proposition that it is only by its consent that the United States may be sued. All this is, of course, true, but we can settle this case without going into the immunity of the United States as a sovereign. The statute prescribes the period of limitation. Neither this Court nor the taxpayer can enlarge that period of limitation beyond what Congress has prescribed. Cf. Richardson v. Smith, No. 13,798, 3d Cir., March 28, 1962. To support the taxpayer's position in this case would involve just that. The language of the Supreme Court in Zellerbach Paper Co. v. Helvering, 293 U.S. 172, 177-78 (1934), is directly in point. There the Court said: "[T]he return exacted by the statute, the one that in the absence of fraud is to start the term of limitation . . ., is the return filed by the taxpayer at the close of the fiscal year, though supplementary information may modify or add to it. . . ." Such cases as Rosenman v. United States, 323 U.S. 658 (1945), involving tentative payments made under protest or payments placed into a "suspense"

fund, are not pertinent here. We see no reason for departing from a literal application of the statute.

It is inappropriate for us to discuss whether or not the taxpayer could have taken steps to avoid this situation during the pendency of the previous action in the Tax Court and in this Court. Statutes of limitation frequently involve some hardship, but the alleviation of that hardship is a matter of policy for the Congress.

The judgment of the district court will be reversed and the case remanded with directions to enter judgment for the defendant.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.